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No. 88-966

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MARIBETH SWEENEY and SUSAN SWEENEY,

Petitioners,

VS.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, First District

RESPONDENT'S BRIEF IN OPPOSITION

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PRAYER

Respondent, the People of the State of Illinois, respectfully requests that the Petition for a Writ of Certiorari be denied.

JURISDICTION

This Court lacks jurisdiction to hear any of the arguments made by petitioners, because those arguments were never made in the Illinois courts. More exactly, petitioners did file a brief in the Appellate Court of Illinois, but that brief did not contain the arguments that petitioners now make in this Court. As is noted in the Petition for a Writ of Certiorari, petitioners raised certain issues in the Appellate Court of Illinois in a Petition for Rehearing. (Petition, p. 4, n.1) However, none of the issues argued in the petition for certiorari were raised in the brief filed by petitioners in the Illinois reviewing court.

The three issues raised in the Petition for Rehearing were described by petitioners as follows in their headnotes:

> I. THIS CASE SHOULD BE REMANDED TO GIVE THE SWEENEYS AN OPPORTUNITY TO AMEND TO THEIR POST-CONVICTION PETITION AND DEVELOP FACTS AT AN EVIDENTIARY HEARING.
>
> II. THE TRIAL COURT'S ORDER GRANTING A NEW TRIAL WAS NOT MANIFESTLY ERRONEOUS.
>
> III. THIS COURT SHOULD NOT HAVE DECIDED THIS CASE ABSENT BENEFIT OF A BRIEF ON BEHALF OF THE SWEENEYS.

Thus, Issues II, III, and IV in the Petition for a Writ of Certiorari were never raised in the lower court.

At first glance it may appear that Issue I in the Petition for a Writ of Certiorari, dealing with the failure of an attorney to file a brief on behalf of a convicted defendant in a post-conviction appeal, was raised in Issue III of the Petition for Rehearing filed in the state reviewing

court. That, however, is not the case. In Issue III of the Petition for Rehearing there is no citation to any constitutional provision, nor is there any citation to any federal court decision, nor is there any constitutional argument whatsoever. In the Appellate Court of Illinois petitioners relied solely on state law in support of the argument that the reviewing court's decision should have been vacated for failure of their attorney to file a brief. Thus petitioners' current federal constitutional claim was never made in the state court.

In summary, petitioners did file a brief in the Appellate Court of Illinois, but at no time in any document filed in that court did petitioners make the constitutional claims found in their Petition for a Writ of Certiorari. Since their claims were not made in the lower state court, this Court lacks jurisdiction to hear them.

Review by this Court, of course, is restricted to those federal questions presented to the highest court of a state having jurisdiction. 28 U.S.C. sec. 1257(3). This Court will not review any federal question which was not presented in state court, even if a related state law claim was presented. *Tacon v. Arizona*, 410 U.S. 351, 93 S.Ct. 998, 35 L.Ed. 2d 346 (1973). Moreover, when a state reviewing court has failed to rule on a federal constitutional question, it will be assumed that the omission resulted from a failure to present that question properly to the state court, unless the petitioner in this Court can affirmatively show to the contrary. *Street v. New York*, 394 U.S. 576, 582, 89 S.Ct. 1354, 1360, 22 L.Ed. 2d 572, 579 (1969). Under the rule stated in *Street* it must be assumed that petitioners failed to present their federal constitutional claims to the Appellate Court of Illinois, since that court did not rule on such claims or even mention them.

Therefore this Court lacks jurisdiction to rule on the claims in the Petition for a Writ of Certiorari. Those claims were never presented to the Appellate Court of Illinois, which was the highest state court which heard this case.

STATEMENT OF THE CASE

On June 17, 1980, Maribeth and Susan Sweeney sold four ounces of cocaine to an undercover police officer for the sum of $8,000.00. (T.R. 25-34) As a result both petitioners were convicted of the crime of Delivery of a Controlled Substance and each was sentenced to a term of six years in custody. Ill. Rev. Stat. 1979, ch. 56½, sec. 1401. The convictions have long since become final (although petitioners have yet to serve their sentences). The present action arose on a post-conviction petition, a form of collateral review. Ill. Rev. Stat. 1985, ch. 38, sec. 122-1 *et seq.*

The Trial

At the trial Special Agent Claude Kaysen testified that on June 17, 1980, in a parking lot in Hickory Hills, Illinois, he had purchased 4 ounces (94 grams) of cocaine from Maribeth and Susan Sweeney. (T.R. 25-34) At the time any delivery of over 30 grams of cocaine was a Class X felony in Illinois, involving a mandatory prison term of at least six years. Ill. Rev. Stat. 1979, ch. 56½, sec. 1401(a)(2). Special Agent Kaysen testified that the June 17 transaction was the second time he had bought cocaine from Susan Sweeney, and that on June 17 Maribeth

Sweeney had told him that she and Susan could sell him four ounces of cocaine anytime he wanted. (T.R. 28)

Both petitioners testified at trial. Maribeth Sweeney testified that she had known that Susan was going to sell four ounces of cocaine, and that she (Maribeth) had come along with a large dog in order to protect her sister. (T.R. 198-202) Susan Sweeney testified that the undercover officer had persuaded her to sell him four ounces of cocaine, while in fact she had initially been willing to sell him only two ounces (57 grams). Susan explained that she had to sell the cocaine to pay off a debt to her supplier. (T.R. 125-134)

Conviction And Sentence

At the conclusion of the trial the judge found Maribeth and Susan Sweeney guilty of delivery of more than 30 grams of cocaine. (T.R. 251-52) The judge specifically found that Maribeth Sweeney had voluntarily abetted the sale of cocaine and that Susan Sweeney had not been entrapped. (T.R. 251-52)

However, the trial judge refused to sentence the defendants to the six year prison terms required by law. Instead, the trial judge held that the classification of cocaine as a narcotic drug was unconstitutional, and that therefore Maribeth and Susan Sweeney were guilty only of a lesser offense. (T.R. 262-71) Each defendant was sentenced to 30 months probation with six months of periodic imprisonment to be served during the daytime on weekends only. (T.R. 280)

The First Appeal

The prosecution appealed the sentence directly to the Illinois Supreme Court, contending that classification of

cocaine as a narcotic drug was constitutional. While the prosecution's appeal was pending, the Illinois Supreme Court decided in another case that cocaine could properly be classified as a narcotic drug. *People v. McCarty*, 86 Ill. 2d 247, 427 N.E.2d 147 (1981). Accordingly, the Illinois Supreme Court summarily reversed the trial judge's ruling as to the sentence and ruled the sentencing statute constitutional. The mandate of the Illinois Supreme Court contained the following order: "The cause is remanded to the circuit court with directions to resentence defendants in accordance with law." *People v. Maribeth Sweeney, et al.* (Ill. Sup. Ct., No. 55206, October 17, 1981, unpublished).

Proceedings On Remand

Although the trial judge had been ordered to resentence Maribeth and Susan Sweeney, he did not do so. Instead, the judge ordered that they be given a new trial, stating that he had not known that he was trying them for a Class X offense and thus had not given them a fair trial. (M.T. 19-20)*

The Mandamus Action

The prosecution began a mandamus action in the Illinois Supreme Court, contending that on remand the trial judge had jurisdiction only to resentence Maribeth and Susan Sweeney and had no jurisdiction under that mandate to grant a new trial. The Illinois Supreme Court agreed, and issued a writ of mandamus ordering the trial judge to

* "T.R." refers to the trial record, "M.T." refers to the transcript submitted to the Illinois Supreme Court in the subsequent mandamus action.

vacate the grant of a new trial and to sentence the defendants to a term in prison. *People ex rel. Daley v. Schreier*, 92 Ill. 2d 271, 442 N.E.2d 185 (1982). Subsequently the trial judge obeyed the order of the Illinois Supreme Court, and sentenced both Maribeth and Susan Sweeney to terms of six years in custody. (Petitioners' Appendix A-5)

The Second Appeal

After the resentencing Maribeth and Susan Sweeney appealed their convictions and sentences to the Appellate Court of Illinois. That appeal was dismissed for want of prosecution. (Petitioners' Appendix A-5)

The Post-Conviction Action

Maribeth and Susan Sweeney then filed a post-conviction petition in the Illinois courts, contending that on collateral review their convictions should be declared unconstitutional. They relied on the statement of the original trial judge that he had not given them a fair trial because he had not known that the punishment for their crime involved mandatory prison term. The judge who heard the post-conviction action ordered that the Sweeneys be given a new trial. (Petitioners' Appendix A-1–A-3)

The Third Appeal

The prosecution appealed the order on collateral review granting the Sweeneys a new trial. After the Sweeneys failed to file a brief on appeal, an order was entered by the Appellate Court of Illinois reversing the order of the trial judge and reinstating the convictions. (Petitioners' Appendix A-4–A-7) The Appellate Court then granted leave to the Sweeneys to substitute new counsel on appeal. (Petitioners' Appendix A-8–A-9) The new attorneys

for the Sweeneys then filed a Petition for Rehearing, raising three different issues and arguing that the order granting a new trial should have been affirmed. A month and a half after the Petition for Rehearing was filed it was denied by the Appellate Court of Illinois. (Petitioners' Appendix A-10) The Illinois Supreme Court subsequently denied leave to appeal, and the Sweeneys now seek a writ of certiorari from this Court.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I.

THERE IS NO RIGHT TO COUNSEL, EFFECTIVE OR OTHERWISE, ON COLLATERAL REVIEW.

Petitioners argue that the decision of the Appellate Court of Illinois must be vacated because the order of that court was entered without a brief being filed on their behalf. That argument is factually false and legally baseless. The argument made by petitioners should be rejected for the following reasons:

1. There was a brief filed for petitioners in the Appellate Court of Illinois in the form of a Petition for Rehearing, and, in addition, the Appellate Court had the benefit of the arguments successfully made by petitioners' attorney in the trial court.
2. There is a recent and definitive decision by this Court holding that there is no right to counsel, or to effective assistance of counsel, on collateral review in a criminal case. *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed. 2d 539 (1987).

Accordingly the petition for a writ of certiorari should be denied.

Pennsylvania v. Finley is directly in point in favor of respondent on this issue. *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed. 2d 539 (1987). In that case an attorney representing a convicted defendant in a state post-conviction action refused to pursue the matter, and instead withdrew as counsel for the petitioner. This Court ruled that no constitutional violation had occurred.

This Court specifically ruled that there was no right to counsel on collateral review in a criminal case. The opinion stated:

> We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks to their convictions and we decline to so hold today. Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further. (107 S.Ct. at 1993, Citation omitted)

Moreover, this Court specifically rejected the idea that an attorney on collateral review of a criminal conviction, when one appears, must provide effective assistance of counsel. Instead, this Court ruled that since there is no right to an attorney on collateral review, it follows that there is no right to an effective attorney on collateral review. 107 S.Ct. at 1994-95.

Thus *Finley* is directly on point. Petitioners here argue that their attorney on collateral review was ineffective for failure to file a brief on appeal. Even if that were true it would not amount to a constitutional violation. As stated in *Finley*, there is no right to effective assistance of counsel on collateral review in a criminal case.

Moreover, even if this Court were inclined to reconsider *Finley*, this would be the wrong case in which to do so. The record here proves that petitioners did receive adequate representation of counsel in the post-conviction appeal. Both in legal theory and in fact, the Appellate Court of Illinois was presented with numerous and effective arguments which could have led it to affirm the order granting a new trial. Certainly there was no complete denial of representation by counsel. *See United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed. 2d 657 (1984).

To begin with, the Appellate Court of Illinois had the benefit of the pleadings and arguments which convinced the trial judge in the post-conviction action to grant petitioners a new trial. Almost by definition, pleadings and arguments which were completely successful in the lower court cannot amount to complete denial of representation on appeal. After all, in post-conviction matters as in other matters in Illinois the findings of the trial court are presumed to be correct on appeal unless the appellant can show them to be manifestly erroneous. *People v. Stone*, 45 Ill. 2d 100, 256 N.E.2d 803 (1970); *People v. Henderson*, 136 Ill. App. 3d 1041, 483 N.E.2d 1068 (4th Dist. 1985); *People v. Matthews*, 37 Ill. App. 3d 1024, 347 N.E. 2d 385 (1st Dist. 1976).

The *Ross* decision of this Court is very much in point here. *Ross v. Moffitt*, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed. 341 (1974). In *Ross*, it was held that after the first appeal of right in a criminal case a defendant has no right to counsel in further discretionary appeals. This Court reasoned that when discretionary review is sought the defendant has the benefit of issues which were fully briefed and argued in the lower court. Similarly, petitioners here during the post-conviction appeal had the benefit of argu-

ments by their attorney which gave them a victory in the lower court.

Moreover, petitioners here did have counsel in the post-conviction appeal and those attorneys did file a brief in the Appellate Court of Illinois. While the appeal was in progress petitioners' current attorneys filed an appearance and later filed a Petition for Rehearing. (Petition 4, Appendix A-8–A-9) That Petition for Rehearing was a brief setting forth the reasons why petitioners felt that the ruling of the lower court should be affirmed. (Petition 4) Of course, petitioners' attorneys were under a procedural disadvantage when making their arguments in a petition for rehearing, but an attorney operating under a procedural disadvantage is very different from no attorney at all. Accordingly petitioners' assertion that no brief was filed for them in the Appellate Court is just not true.

Thus the *Penson* decision has nothing to do with this case. *Penson v. Ohio*, 109 S.Ct. 346 (1988). *Penson* involved a direct appeal from a criminal conviction in which the defendant has a right to counsel, while here petitioners have no right to counsel in the post-conviction appeal. The defense attorney in *Penson* refused to file a brief for his client, while here petitioners did have a brief filed on their behalf in the reviewing court. Petitioners also rely on the *Thomas* decision of the Seventh Circuit, in which it was held that it is automatically ineffective assistance of counsel when a defense attorney fails to file a brief when the prosecution brings an interlocutory appeal in a criminal case. *United States ex rel. Thomas v. O'Leary*, 856 F.2d 1011 (7th Cir. 1988). *Thomas* was wrongly decided, but this would not be a proper case to consider that question. Unlike *Thomas*, this case involves a post-conviction proceeding and unlike *Thomas*, in this case petitioners did have a brief filed by their attorneys in the state reviewing court.

In conclusion, it is well established that there is no right to counsel, or to effective assistance of counsel, when a convicted defendant seeks collateral review. Moreover, petitioners here did receive effective assistance of counsel, since the Appellate Court of Illinois had the benefit of briefs and arguments which were good enough to have won in the lower court. Therefore the petition for a writ of certiorari should be denied.

II.

THE NEED FOR COUNSEL IS AT A MINIMUM WHEN THE STATE APPEALS FROM A GRANT OF POST-CONVICTION RELIEF, BECAUSE THEN THE APPELLATE COURT IS AUTOMATICALLY BRIEFED WITH THE ARGUMENTS WHICH WON IN THE TRIAL COURT.

Petitioners argue that, even if there is no general right to counsel during collateral review of a conviction, nevertheless there should be a right to an attorney when a trial court grants post-conviction relief and the State appeals from that ruling. Petitioners have their policy arguments totally mixed up, because in fact the need for an attorney on collateral review is at a minimum when the convicted defendant has won in the trial court and is the appellee on review. Petitioners' argument should be rejected for the following reasons:

1. It is inconsistent with the *Finley* decision of this Court. *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed. 2d 539 (1987).
2. Petitioners' proposed exception to *Finley* is illogical, because it would create a right to counsel at the stage of post-conviction proceedings at which the usefulness of an attorney would be at a minimum.

In *Finley* this Court ruled, without any reservations or exceptions, that there was no right to counsel or to ef-

fective assistance of counsel on collateral review in a criminal case. *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed. 2d 539 (1987). Thus, under *Finley*, petitioners' argument that they had a right to effective assistance of counsel on appeal in a post-conviction action must be rejected.

Petitioners argue, however, that when a convicted defendant is granted post-conviction relief by a trial court, and the prosecution appeals, then the right to counsel attaches. The problem with that argument is that it would create a right to counsel in post-conviction proceedings at exactly the point at which an attorney would be of the least use. When a convicted defendant has been granted relief on the trial court level, then he does not have to do anything in order to have that decision affirmed on appeal. It then would be up to the State to prove that the trial court decision was wrong, and in reviewing that decision the appellate court will have the benefit of the evidence and arguments which won for the convicted defendant in the trial court. In legal theory the decision of a trial court is presumed correct on appeal, and it is up to the appellant to prove the trial judge wrong rather than up to the appellee to prove the judge right. In practice an appellate court reviewing a grant of post-conviction relief will read in the record on appeal both the arguments which convinced the trial judge to rule in favor of the convicted defendant and also the findings by the trial judge justifying his decision.

Thus, when the prosecution appeals from a grant of post-conviction relief, the convicted defendant could easily win without an attorney. Indeed, an attorney would be more useful at any other stage of collateral review of a conviction. An attorney might be useful in drafting a petition for post-conviction relief and in presenting legal argu-

ments in support of it. If an evidentiary hearing is held then an attorney might be useful in interrogating witnesses. If the trial judge rules against the convicted defendant, then an attorney might be useful in trying to convince a reviewing court that the trial judge was wrong. But when the trial judge grants post-conviction relief, then the convicted defendant can prevail on appeal without an attorney because the arguments which won in the trial court will automatically be before the reviewing court. *See Ross v. Moffitt*, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed. 2d 341 (1974).

As previously noted, in Illinois the ruling of a trial judge on a post-conviction petition is presumed correct unless manifestly in error. *People v. Stone*, 45 Ill. 2d 100, 256 N.E.2d 803 (1970); *People v. Matthews*, 37 Ill. App. 3d 1024, 347 N.E.2d 385 (1st Dist. 1976). Thus, in the post-conviction appeal in this case, it was the burden of the State to show that the trial judge's ruling was wrong, and it was not the burden of petitioners to show anything. It would be irrational to say that petitioners had no right to counsel when they had the burden of proof in the post-conviction action, but did have a right to counsel when they had no burden at all.

In any event, petitioners did receive effective assistance of counsel in the post-conviction appeal. The arguments in their favor were more than adequately presented in the trial court record and in the Petition for Rehearing.

In conclusion, this Court has specifically held that there is no right to counsel in post-conviction proceedings. It would make no sense to apply that rule on collateral review at the trial court level but to make an exception to that rule when the prosecution appeals from a trial court ruling.

III.

THE NON-EXISTENT RIGHT TO A SPEEDY APPEAL IS NOT AT ISSUE HERE, SINCE THE DELAYS IN THE POST-CONVICTION APPEALS IN THIS MATTER HAVE BENEFITED PETITIONERS RATHER THAN HARMED THEM.

Petitioners ask this Court to establish a new constitutional right for convicted defendants, namely a right to a speedy appeal. For the following reasons this would be the wrong case in which to consider that question:

1. This case arose on collateral review after the convictions of petitioners became final, so the alleged right to speedy review of a criminal conviction is not at issue here.
2. Given the extremely tangled procedural history of this case, it is not at all clear who is responsible for the delay in final resolution of the matter.
3. Petitioners here, who are free on bond, have benefited enormously from the delays in a final ruling on the case, and have not been prejudiced in any way.

Petitioners have no reason at all to complain about delays in the appellate process. They were caught red-handed dealing in cocaine in 1980, and their testimony at trial showed that they had no defense to the charge. Nevertheless, about nine years have passed and petitioners have not yet started serving their sentences. Petitioners have not suggested that they have been prejudiced in any way by the delays in the ultimate resolution in this case. In the absence of prejudice, their claim of unreasonable delay should be rejected. *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed. 2d 101 (1972).

As petitioners tacitly acknowledge, this Court has never held that there is a right to a speedy appeal in a crim-

inal case. Logically, if that question is ever considered by this Court it should be in a case involving the first appeal as of right from a criminal conviction. Petitioners' case, on the other hand, does not involve a right to a speedy appeal from a criminal conviction, but rather an alleged right to a speedy appeal on collateral review long after petitioners' convictions became final. The cases cited by petitioners involve the first appeal as of right from a conviction. *Burkett v. Cunningham*, 826 F.2d 1208 (3d Cir. 1987); *Rheuark v. Shaw*, 628 F.2d 297 (5th Cir. 1980). Since the alleged right to a speedy appeal from a conviction is not involved in this case, certiorari should be denied.

Also, the procedural history of this case is too tangled to clearly present the issue of whether there is a right to a speedy appeal in a criminal case. There have been three appeals in this case, as well as a mandamus action which was an appeal for all practical purposes. It is the position of respondent that the delays in this case are primarily due to the actions of petitioners, and that petitioners are the only parties who have benefited from those delays.

Finally, the decisions of this Court indicate that there is no specific constitutional right to a speedy appeal in a criminal case. This Court has held the speedy trial clause of the Sixth Amendment applies only to the period when charges are pending in the trial court. *United States v. McDonald*, 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed. 2d 696 (1982); *United States v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed. 2d 752 (1977). More importantly, this Court has also held that the time consumed by an interlocutory appeal brought by the prosecution should not be considered on the question of whether the right to a speedy

trial had been violated. *United States v. Loud Hawk*, 474 U.S. 302, 106 S.Ct. 648, 88 L.Ed. 2d 640 (1986).

In conclusion, the question of whether there is a right to a speedy appeal in a criminal case is not at issue here. The appeal in this matter is not from a criminal conviction, but instead arose on collateral review after petitioners' convictions were final.

IV.

THE ISSUE RAISED BY PETITIONERS CONCERNING THE COMMENTS OF THE TRIAL JUDGE IS BARRED BY INDEPENDENT AND ADEQUATE STATE GROUNDS, AND IN ANY EVENT THOSE COMMENTS WERE LEGALLY IRRELEVANT BECAUSE THEY WERE MADE AT A TIME WHEN THE JUDGE HAD NO JURISDICTION TO HEAR TRIAL ISSUES.

Petitioners were convicted of a crime carrying a mandatory sentence of imprisonment. Ill. Rev. Stat. 1979, ch. 56½, sec. 1401. The trial judge, however, refused to follow the law and instead sentenced petitioners to probation. (T.R. 280) The Illinois Supreme Court ordered the trial judge to sentence petitioners as required by statute, but the judge still refused to obey the law. A year after the trial he declared, without giving any specific reason, that he had not given petitioners a fair trial and he vacated the convictions.

Petitioners argue that the trial judge's declaration on remand may not be questioned and was fatal to the convictions. This argument should be rejected for the following reasons:

1. It is barred by independent and adequate state grounds, because it should have been raised in the direct appeal from the convictions and sentences.

2. The statement of the trial judge on remand was of no legal effect or importance, since it was made at a time when that judge had no jurisdiction to consider any trial issues.

The second time the Illinois Supreme Court ordered the trial judge to sentence petitioners as required by law, the trial judge complied and imposed six year sentences. Petitioners then appealed the convictions and sentences to the Appellate Court of Illinois, but that appeal was dismissed for want of prosecution. Nevertheless, as the Appellate Court found in the present appeal, the *res judicata* effect of the direct appeal from the conviction bars consideration of this issue on collateral review in Illinois. (Petitioners' Appendix A-7)

In Illinois all issues which were raised or could have been raised on direct appeal are *res judicata* in post-conviction proceedings. *People v. Kubat*, 114 Ill. 2d 424, 501 N.E.2d 111 (1986); *People v. Roberts*, 75 Ill. 2d 1, 387 N.E.2d 331 (1979). Thus, as the Appellate Court of Illinois found, the issue of the trial judge's statement on remand was barred in the post-conviction proceedings because it could have been raised on direct appeal. This rule of *res judicata* in an independent and adequate state grounds supporting the decision, so certiorari should be denied. "Failure to present a federal constitutional question in conformance with state procedure constitutes an adequate and independent grounds of decision barring review by this Court, so long as the State has a legitimate interest in enforcing its procedural rule." *Michigan v. Tyler*, 436 U.S. 499, 512 n.7, 98 S.Ct. 1942, 1951 n.7, 56 L.Ed. 2d 486, 500 n.7 (1978).

Moreover, at the time the judge made his statement about a fair trial he had no jurisdiction over any trial

issues and no jurisdiction to vacate the convictions. Thus his comments had no more importance from a legal point of view then if they had been made at a cocktail party or on the street. A year after petitioners' trial this matter had been remanded to the trial court with a mandate to do one thing and one thing only, namely to sentence petitioners as required by law. As the Illinois Supreme Court later held, the trial judge at that point had authority only to follow that mandate, and had no jurisdiction to do anything else. *People ex rel. Daley v. Schreier*, 92 Ill. 2d 271, 442 N.E.2d 185 (1982). Petitioners rely on comments by a trial judge who, as a matter of state law, had no jurisdiction to consider the issue. This is another independent and adequate state ground supporting the decision of the Appellate Court.

Finally, the record indicates that the Appellate Court of Illinois was right when it found that petitioners had in fact received a fair trial. Indeed, evidence of guilt was overwhelming and the testimony of petitioners amounted to a plea for sympathy rather than a defense to the charge. Certiorari should be denied because petitioners were justly convicted.

In conclusion, petitioners' argument on this issue was barred under Illinois law by *res judicata*. In addition, petitioners rely on comments by a judge who, under Illinois law, has no jurisdiction to consider any trial issues. Since the decision of the Appellate Court of Illinois is supported by independent and adequate state grounds, certiorari should be denied.

CONCLUSION

Respondent, the People of the State of Illinois, respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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